No. 98-369

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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STATEMENT OF THE CASE

This case arose out of an investigation into the conduct of an employee of the George C. Marshall Space Flight Center, a National Aeronautics and Space Administration ("NASA") facility. Pet. App. 2a. The investigation was conducted by the NASA Office of the Inspector General ("NASA-OIG") on the basis of information provided by the Federal Bureau of Investigation indicating that the employee under investigation had threatened and made plans to comimt violence against several co-workers. *Id.*

The employee under investigation worked in a bargaining unit that is represented by the American Federation of Government Employees ("AFGE"). Pet. App. 3a. When the NASA-OIG investigator summoned the employee to an investigatory interview, the employee requested both union assistance pursuant to § 7114(a)(2)(B) of the Federal Sector Labor Management Relations Statute ("FSLMRS"), 5 U.S.C. § 7114(a)(2)(B), and legal assistance pursuant to 5 U.S.C. § 555(b). *Id.* The investigator complied with these requests and arranged for the interview to take place at the office of the employee's attorney with a union representative present. *Id.*

At the beginning of the interview, the NASA-OIG investigator stated certain ground rules. Pet. App. 3a. One such ground rule was that the employee would face dismissal from employment if he refused to answer any of the investigator's questions. *Id.* at 3a n.2. Another ground rule was that the union representative was present only as a witness and could not interrupt questions or answers *Id.* at 3a. The union representative objected to these ground rules, but the interview proceeded. *Id.* On a number of occasions during the examination, the NASA-OIG investigator challenged the efforts of the union representative to assist the employee. *Id.*

Acting on charges filed by AFGE Local 3434, the General Counsel of the Federal Labor Relations Authority ("FLRA") issued a complaint alleging that NASA and the NASA-OIG had violated FSLMRS § 7114(a)(2)(B) by interfering with the union's representation of the employee at the examination. Pet. App. 3a-4a. The FLRA found merit to this complaint and ordered NASA and the NASA-OIG to cease and desist from violating that provision. *Id.* at 4a. The FLRA further directed NASA to post appropriate notice forms and to direct the NASA-OIG to comply with the requirements of FSLMRS § 7114(a)(2)(B) in conducting investigatory examinations. *Id.*

The FLRA petitioned for enforcement of its order. Pet. App. 4a. NASA and the NASA-OIG petitioned for review. *Id.* Acting on these cross-petitions, the United States Court of Appeals for the Eleventh Circuit enforced the FLRA order and denied the petition for review. *Id.* at 20a.

SUMMARY OF ARGUMENT

I. In this case, the Federal Labor Relations Authority ruled that a NASA Office of the Inspector General investigator was acting as a "representative of the agency," within the meaning of § 7114(a)(2)(B) of the Federal Sector Labor Management Relations Statute ("FSLMRS"), when the investigator conducted an examination of a NASA employee. The FLRA's construction of the FSLMRS is consistent with the statute's language and with its legislative history.

A. NASA is unquestionably an "agency" by virtue of being an independent establishment within the Executive branch. And, given the statutory definition of "agency," it is clear that no subpart of NASA can be an "agency" within the statutory meaning of that term. Thus, with respect to an examination of one NASA employee by another NASA employee (the NASA-OIG investigator) it is clear that NASA is the pertinent "agency" for FSLMRS § 7114(a)(2)(B) purposes. And, this is so regardless of whether the examined employee is employed in a different subpart of NASA than the examining employee.

The term "representative" is not defined in the FSLMRS. Rather, the statute uses the term "representative" in a variety of contexts to refer to a person acting on behalf of an agency, labor organization, bargaining unit, or individual employee. From the various contexts in which the term "representative" appears, it is apparent that the FSLMRS uses this term—in accordance with normal usage—to designate someone who is acting for and on behalf of someone else.

In conducting the employee examination in question here, the NASA-OIG investigator was acting as a repre-

sentative of NASA. The NASA-OIG investigator is an employee of NASA charged with undertaking investigations of NASA's operations—including investigations into personnel misconduct—for the purpose of reporting to the head of NASA. Consistent with these responsibilities, the investigator's purpose in conducting the examination in question here was to gather information for NASA's use in conducting that agency's operations. And, the investigator invoked NASA's authority as employer by threatening the employee with discipline if he refused to participate in the examination.

B. The legislative history of FSLMRS § 7114(a)(2)(B) reinforces the plain meaning of the statutory language and demonstrates that the FLRA was correct in construing this provision as applying to the examination conducted by the NASA-OIG investigator.

Congress's stated purpose in enacting § 7114(a)(2)(B) was to grant federal employees a right to union representation at investigatory interviews of the same kind as private sector employees already enjoyed under *NLRB v. J. Weingarten,* 420 U.S. 251 (1975). In *Weingarten* itself, as in a number of NLRB decisions applying the *Weingarten* rule prior to the enactment of the FSLMRS, the investigatory interview in question was carried out by a security specialist employed by a separate security division within the employer. And, the fact that the persons conducting such interviews were security specialists unfamiliar to the interviewed employee was cited by the NLRB as creating a special need for union representation in this context.

The FSLMRS Congress was, moreover, aware of the existence of special investigative divisions within Federal agencies, and proponents of extending *Weingarten* rights to Federal employees cited examinations by such securty specialists in arguing that Federal employees needed protection similar to that given private sector employees.

Given the NLRA law applying *Weingarten* to interviews conducted by security specialists and given the FSLMRS Congress's attention to federal security specialists, the FLRA clearly acted within its authority when it read FSLMRS § 7114(a)(2)(B) in accordance with its plain meaning as covering interviews of agency employees conducted by the agency's OIG. Indeed, post-*Weingarten* decisions of the National Labor Relations Board have recognized that employees of the U.S. Postal Service are entitled to request union representation when called into interviews by Postal Inspectors, who are law enforcement officers employed in a separate Postal Service investigatory devision.

C. NASA's contrary reading of FSLMRS § 7114(a)(2)(B) contradicts the statutory language and thwarts the legislative intent.

NASA suggests that the pertinent "agency" for purposes of identifying a "representative of the agency" within the meaning of FSLMRS § 7114(a)(2)(B) is the subpart of the agency engaged directly in collective bargaining with the interviewed employee's union. This suggestion is belied by the statutory definition of the term "agency," which precludes treating a subpart of an agency as itself an agency.

NASA also suggests that the word "representative" has a special meaning in the FSLMRS and denotes someone who acts under the control of agency management for the purpose of engaging in collective bargaining. And, based on this peculiar reading of the term "representative," NASA argues that an OIG investigator cannot be a "representative of the agency," because the OIG investigator neither engages in collective bargaining nor operates under the control of agency management. The diverse contexts in which the FSLMRS speaks of various parties having "representatives" demonstrates that the term "representative" is not restricted to a collective bargaining representative. And, there is nothing in the statute indicating that

a "representative of the agency" has to be under the control of agency management. In any event, NASA clearly had the authority to prevent the statutory violation here by directing the NASA-OIG to comply with the FSLMRS and by acting in its own capacity as the employer to provide NASA employees with the choice of not participating in an OIG interview where union representation has been denied.

II. The FLRA's construction of FSLMRS § 7114(a)(2)(B) does not bring that statute into conflict with the Inspector General Act. The two conflicts asserted by NASA—that the presence of a union representative interferes with the OIG's duty of confidentiality and restricts the OIG investigator's freedom to investigate—are entirely insubstantial. With respect to the first alleged conflict, NASA has failed to demonstrate that an OIG interview is confidential in law or in fact. With respect to the second alleged conflict, NASA acknowledges that it can point to no actual example of a union representative's presence interfering with the conduct of an OIG examination, and NASA's vague concerns over how the FLRA might expand the representation right do not establish any concrete risk of interference.

ARGUMENT

Section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute ("FSLMRS" or "Federal Labor Statute") provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (B) any examination . . . by a representative of the agency in connection with an investigation if—
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

> (ii) the employee requests representation. [5 U.S.C. § 7114(a)(2)(B).]

This case concerns the application of this provision to the examination of an employee of the National Aeronautics and Space Administration ("NASA" or "Administration") by an investigator on the staff of the NASA Office of the Inspector General ("NASA-OIG"). Pet. App. 22a.[1] As the case comes to this Court, the sole question presented is

> whether the Federal Labor Relations Authority properly concluded that an investigator from an agency's Office of the Inspector General is a "representative of the agency" within the meaning of § 7114(a)(2)(B). [Pet. App. 2a (abbrev. omitted).]

The answer to that question is that the FLRA's conclusion *is* proper. The FLRA "has long held that an OIG investigator can, under certain circumstances, be a 'representative of the agency' within the meaning of section 7114(a)(2)(B) of the Statute." Pet. App. 37a. And, in the circumstances of this case, the Authority held that an OIG investigator is acting as a "representative of the agency" when the investigator compels an agency employee to participate in an examination, on threat of discipline, which examination could reasonably be thought to result in disciplinary action by the agency against its em-

---

[1] The NASA employee was allowed to have a union representative present at the examination. However, the investigator interfered with the representative's attempts to confer with the employee during the examination. And, the Federal Labor Relations Authority ("FLRA") found that, by reason of the investigator's denial of effective representation, NASA and the NASA-OIG violated the employee's rights under FSLMRS § 7114(a)(2)(B). Pet. App. 48a-49a. Before the FLRA, NASA's principal defense was that the Administration had complied with § 7114(a)(2)(B) by allowing a union representative to be present. Pet. App. 28a-37a. In the court of appeals, however, the focus of the case shifted to whether federal employees have *any* right to union representation in the context of an examination by an OIG investigator. Pet. App. 6a-15a.

ployee. *Id.* at 41a-43a. In both its general understanding of the statutory language and in its application of the Federal Labor Statute here, the FLRA is entirely correct.

In the opinion below, the FLRA, in addition, gave careful consideration to whether the requirements of FSLMRS § 7114(a)(2)(B) conflict with the requirements of the Inspector General Act ("IGA") governing the functions of the NASA-OIG. Having "examined the language of both statutes and their legislative histories and considered the interrelationship between these two enactments," the Authority concluded that there is no such conflict. Pet. App. 43a. *See id.* 44a-47a.

Following the analytical framework of the decisions below, we first show that the FLRA's reading of FSLMRS § 7114(a)(2)(B) is " 'a permissible contruction of the statute.' " *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 645 (1990), quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). We then show that the FLRA correctly determined that FSLMRS § 7114(a)(2)(B), as construed by the Authority, is not in conflict with the Inspector General Act.[2]

I. THE FLRA PROPERLY CONCLUDED THAT THE NASA-OIG INVESTIGATOR ACTED AS A "REPRESENTATIVE OF THE AGENCY" WITHIN THE MEANING OF FSLMRS § 7114(a)(2)(B).

A. The Statutory Language.

In construing a statute, the "starting point must be the language employed by Congress." *American Tobacco*

[2] The court below described the appropriate "bifurcated review of the Authority's decision in this case" as follows:

> We will review with deference the Authority's interpretation of § 7114(a)(2)(B) and will uphold its conclusions with respect to this section as long as they are reasonable and defensible. We will determine independently, however, whether the Authority's construction of this section of its own statute impermissibly conflicts with another federal statute, namely the Inspector General Act of 1978. [Pet. App. 5a-6a (citations omitted).]

Co. v. Patterson, 456 U.S. 63, 68 (1982). And, as Judge Newman of the Seond Circuit has noted, whether the statutory phrase "representative of the agency" in FSLMRS § 7114(a)(2)(B) encompasses an OIG investigator "raise[s] two issues: (a) what entity is the pertinent 'agency' and (b) is an OIG agent a 'representative' of the pertinent 'agency?' " *FLRA v. U.S. Department of Justice*, 137 F.3d 683, 688 (2d Cir. 1998) pet. for cert. filed, No. 98-667 (Oct. 22, 1998). In this case, the FLRA determined that NASA is the pertinent "agency" and that the investigator for NASA-OIG examining the NASA employee was a "representative of the agency [*viz.* NASA]." Pet. App. 37a-43a. Both of these determinations are dictated by the plain language of the statute.

1. *NASA is the Pertinent "Agency."*

The FSLMRS does not leave any doubt as to the meaning of the term "agency" as that term is used in the statute.

The "Definitions" provision of the FSLMRS states that —with certain exceptions not pertinent here—" 'agency' means an Executive agency." 5 U.S.C. § 7103(a)(3).

"Executive agency," in its turn, is also a defined term. Section 105 of title 5—the title containing the FSLMRS—states: "For the purposes of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105. The terms "Executive department," and "Government corporation," therein are defined by listing the particular federal government entities that fall within each category. 5 U.S.C. §§ 101 & 103. And, "independent establishment" is defined through a process of negation as "an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." 5 U.S.C. § 104.

Defining the term "agency" by reference to the title 5 definition of "Executive agency" is not unique to the

FSLMRS. *See, e.g.*, 5 U.S.C. § 5721(1)(A) (" 'agency' means—an Executive agency"). And, that definition in its terms connotes a deliberate choice by Congress to treat only the agency *as a whole* as the statutory "agency" and to exclude any possibility that a subpart of the parent might also be considered an "agency" within the statutory meaning of that term.

As we have noted above, "Executive agency" is defined to include *only* certain specified "Executive departments" and "Government corporation[s]," 5 U.S.C. §§ 101 & 103. "Independent establishment" is then defined to *exclude* "an[y] Executive department, military department, Government corporation, or *part thereof*, or *part of* an independent establishment." 5 U.S.C.§ 104 (emphasis added). And, when Congress means to define "agency" in a manner which permits subparts of the agency to be considered an agency for the purposes at hand, the Legislature employs a different locution. *See* 5 U.S.C. § 551(1) (" 'agency' means each authority of the Government of the United States").

Fitting these interdependent statutory definitions together, we see the following whole: NASA is an independent administration "headed by an Administrator, who shall be appointed from civilian life by the President by and with the advice and consent of the Senate," and who exercises his authority "[u]nder the supervision and direction of the President." 42 U.S.C. § 2472(a). And, NASA is *not* among the entities listed in the definitions of "Executive departments," 5 U.S.C. § 101, "military departments," 5 U.S.C. § 102, and "Government corporation," 5 U.S.C. § 103. Thus, NASA *is* an "independent establishment" within the executive branch, and, as such, *is* a § 105 "Executive agency," and, hence, an FSLMRS § 7103(a)(3) "agency." It follows, too, that by defining "agency" as it did in the FSLMRS, Congress intended to treat the "agency" as a whole—here NASA—as the employer and to *not* treat subparts of the agency as separate employers.

This understanding of the FSLMRS is reinforced by the distinction between an "agency" and the subparts of an "agency" made repeatedly throughout the statute. *See e.g.*, 5 U.S.C. §§ 7112(a) ("the appropriate unit should be established on an agency, plant, installation, functional, or other basis"), 7112(d) ("[t]wo or more units which are in an agency"), 7113(a) ("If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis"), § 7114(a)(4) ("Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate"), 7117(a)(3) ("any rule or regulation issued by any agency or issued by any primary national subdivision of such agency").

By the plain words of the statute, then, "NASA is an 'agency' under 5 U.S.C. § 7103(a)(3)." Pet. App. 42a. *See also id.* at 9a. It is equally plain that NASA is *the* "pertinent agency" for purposes of determining who is a "representative of the agency" under § 7114(a)(2)(B). *Id.* at 8a-9a.

Not surprisingly then, the FLRA's approach to identifying the pertinent agency for FSLMRS § 7114(a)(2)(B) purposes has been sustained by the Second and Third Circuits as well as by the Eleventh Circuit in this case, Pet. App. 8a-10a. *See FLRA v. U.S. Department of Justice*, 137 F.3d at 688-690; *Defense Criminal Investigative Service v. FLRA*, 855 F.2d 93, 98-99 (3d Cir. 1988).

2. *The NASA-OIG Investigator Acted as a Representative of NASA in Conducting the Interview in Question.*

In contrast to the term "agency," the term "representative" is not defined in the FSLMRS. Rather, in a variety of settings, the term "representative" is employed in the FSLMRS to designate a person who acts for and on behalf of a labor organization, a federal agency, or individual federal employees. *See, e.g.*, 5 U.S.C. §§ 7114(a)(2)(A), 7114(a)(2)(B), & 7114(a)(4).

The FSLMRS recognizes that a labor organization, which itself is the "exclusive representative" of a bargaining unit, 5 U.S.C. § 7103(a)(16), will necessarily act through "representatives" of its own, *id.* §§ 7114(a)(4) & (b)(2). *See also id.* §§ 7102(1) & 7131(a) & (d). And, the FSLMRS provides that a labor organization may be "represented" in a variety of settings, including contract negotiations, *id.* § 7114(b)(2), "present[ing] the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities," *id.*, § 7102(1), certain "formal discussion[s]" concerning grievances, personnel policies and conditions of employment, *id.* § 7114(a)(2)(A), and certain investigatory examinations, *id.* § 7114(a)(2)(B).

The "agency" that employs the bargaining unit employees will, of course, also act through its own "representatives." 5 U.S.C. §§ 7114(a)(4) & (b)(2). As is true of labor organization representatives, these "representatives" of the agency will also act on the agency's behalf in a variety of settings, including contract negotiations, *id.* § 7114(b)(2), "formal discussion[s]" concerning grievances, personnel policies and conditions of employment, *id.* § 7114(a)(2)(A), and certain investigatory examinations, *id.* § 7114(a)(2)(B).

Individual employees themselves—although represented in contract negotiations exclusively by the labor organization certified as the bargaining unit's certified representative—have the right to be "represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action." 5 U.S.C. 7114(a)(5)(A). The breadth of the statutory definition of the term "grievance"—as including "any complaint . . . by any employee concerning any matter relating to the employment of the employee," *id.* § 7103(a)(9)(A)—is such that there are many opportunities for employees to be represented by a "representative" other than the unit's "exclusive representative" in

dealing with the agency on employment-related matters. *See id.* § 7114(a)(2)(A) ("any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.").

There is nothing in the FSLMRS limiting the identity of labor organization, agency, and employee "representatives" in the various, widely disparate contexts referred to in the statute. The only condition placed on who is an "appropriate representative" by the FSLMRS is the specification that "an agency and an exclusive representative" must be "represented at [contract] negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment." 5 U.S.C. § 7114(b)(2). Otherwise, the statute does not structure who an agency, labor organization, or employee "representative" shall be in any of the statutory contexts in which it is contemplated that the parties will act—and interact—through representatives.

Given the lack of a statutory definition for the term "representative" and the wide variety of settings in which the statute expressly provides that labor organizations, agencies, and employees will act through representatives, it can only be that Congress did not employ the term "representative" in any special, restrictive sense, but rather intended that the term is to be understood to mean what it means in ordinary usage. *See FDIC v. Meyer,* 510 U.S. 471, 476 (1994) ("In the absence of such a definition [in the Act], we construe a statutory term in accordance with its ordinary or natural meaning.").

The normal meaning of the term "representative," in the usage the FSLMRS obviously employs, is "one that represents another or others in a special capacity." *Webster's Third New International Dictionary* 1926 (1986). *See, e.g.,* 42 U.S.C. § 3058f(5) ("The term 'representative' includes an employee or volunteer who

represents an entity designated under section 3058g(a)(5)(A) of this title and who is individually designated by the Ombudsman."); 45 U.S.C. § 151, Sixth ("The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."). Thus, who is a "representative" of a "bargaining unit," "labor organization," "agency," or "employee," within the meaning of the FSLMRS will be determined by who is authorized to represent—in the sense of act for and on behalf of—the "bargaining unit," "labor organization," "agency" or "employee" in the particular setting identified in the FSLMRS.

For example, in "any formal discussion . . . concerning any grievance or any personnel policy or practices or other general condition of employment," the "representatives of the agency," the "representatives" of "one or more employees in the unit," and the representative of the "exclusive representative" will be the persons authorized to act for those various parties in the "discussion." 5 U.S.C. § 7114(a)(2)(A). And, the "representative of the agency" and representative of the "exclusive representative" in an "examination of an employee in the unit" will, likewise, be whoever is authorized to act for those parties in the "examination." 5 U.S.C. § 7114(a)(2)(B).

The NASA-OIG inspector—who "is an employee of and ultimately reports to the head of NASA," Pet. App. 41a—was certainly authorized to act for NASA in conducting the interview in question.

The interview was to provide NASA with information relevant to determining whether to take administrative action with respect to its own employees and operations and in that way to further the agency's purposes.[3] And, gathering information concerning an agency's operations

[3] As the court below noted, by the time of the examination, "NASA-OIG had determined that no criminal action would be taken against the employee." Pet. App. 3a n.1.

is one of the OIG's central assignments. Under the Inspector General Act it is "the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established . . . to keep the head of such establishment . . . fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, [and] to recommend corrective action concerning such problems, abuses, and deficiencies." 5 U.S.C. app. 3 § 4(a)(5). In this regard, the Senate Report on the bill that was enacted as the Inspector General Act emphasizes that the inspector general is intended to be "the strong right arm" of "the agency head" in "running and managing the agency effectively and [in] rooting out fraud, abuse and waste at all levels." Sen. Rep. No. 95-1071, 95th Cong., 2d Sess. 9 (1978).

Consistent with this statutory assignment, "NASA-OIG performs an investigatory role for NASA, HQ, and its subcomponents," and "[t]he information obtained during the course of an OIG investigatory examination may be released to, and used by, other subcomponents of NASA to support administrative or disciplinary actions taken against unit employees." Pet. App. 42a.

As the court below noted, "[i]n conducting investigations within the agency, NASA-OIG serves the interest of NASA-HQ by soliciting information of possible misconduct committed by NASA employees." Pet. App. 19a. Precisely because that is so, it is NASA that provides the compulsion on NASA employees to subject themselves to examination by the NASA-OIG investigators by providing that employees who refuse to participate are subject to employment discipline. Indeed, the NASA-OIG investigator in this case expressly threatened the NASA employee with such discipline if there was noncooperation. Pet. App. 19a. And, only the head of NASA and his delegates have the authority to discipline a NASA employee. 5 U.S.C. § 302(b)(1); 42 U.S.C. § 2472(a). In contrast,

the Inspector General Act does *not* grant to OIGs any independent authority to discipline agency employees or to otherwise compel the attendance of persons at OIG examinations. 5 U.S.C. app. 3 § 6(a). *See* NASA Br. 31 n. 18 & 32.

Thus, when the NASA-OIG investigator threatened the NASA employee with discipline, the investigator was not threatening the employee with an action the investigator was empowered to take by virtue of any independent authority of the NASA-OIG. Rather, the investigator was threatening the employee with action that NASA would take—exercising the agency's authority as the employer—to further the conduct of the examination into an aspect of NASA operations being carried out by the NASA-OIG for and on behalf of the Agency.

In other words, the NASA-OIG was not only representing NASA's interests in conducting the examination, the NASA-OIG was invoking NASA's authority as employer in carrying out the examination. *See* Pet. App. 19a. That is of particular significance here since the FLRA holds that, faced with "a valid request for union representation," an employer can meet its obligations under FSLMRS § 7114(a)(2)(B) in any one of three ways: "(1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all." *U.S. Department of Justice, Bureau of Prisons*, 27 FLRA 874, 879 (1987). *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 258 (1975) ("the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one").

Had the NASA employee here been offered "the choice between continuing the interview unaccompanied by a union representative or having no interview at all," 27 FLRA at 879, rather than being compelled to continue with the interview by the prospect of employment discipline, there would have been *no* FSLMRS § 7114(a)(2)(B) violation. And, it was only the prospect that NASA would discipline a NASA employee for not complying in a NASA-OIG investigator's examination that denies the employees the choice of leaving the examination.

In sum, in conducting the interview at issue, the NASA-OIG investigator was a NASA employee, acting within the scope of his authority as an OIG investigator and under the aegis of NASA's authority as employer and for the purpose of gathering information about NASA operations to be used by NASA in making a decision on whether to take administrative action with respect to a NASA employee and as to the conduct of NASA's operations. All this being true it follows that the NASA-OIG investigator was acting for and on behalf of NASA in conducting the examination and thus as a "representative of the agency" for purposes of FSLMRS § 7114(a)(2)(B).[4]

B. The Legislative Intent.

The FLRA's reading of FSLMRS § 7114(a)(2)(B) is consistent not only with the statutory language but also with the congressional intent behind that language.

"It is apparent from the face of the statute that Congress wanted federal employees to have the assistance of a union representative when they were placed in a position of being called upon to supply information that would expose them to the risk of disciplinary action." *Defense Criminal Investigative Service*, 855 F.2d at 98-99. And, the FSLMRS § 7114(a)(2)(B) legislative materials confirm that "Congress intended that Federal employee have the

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[4] NASA has never questioned that, in conducting the examination in question, the NASA-OIG was acting as a "representative" of an "agency" within the meaning of § 555(b) of the Administrative Procedure Act, which provides that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel. . . ." 5 U.S.C. § 555(b). *See* NASA Br. 34.

same rights as their counterparts in the private sector—the assistance of a union representative when they are called upon to provide information that exposes them to the risk of disciplinary action." Pet. App. 41a.

Section 7114(a)(2)(B), as enacted, was part of a comprehensive bill offered by Representative Udall. *See* H. Rep. No. 95-1717, 95th Cong., 2d Sess. 155-156 (1978). Representative Udall explained the purpose of this provision as follows:

> The . . . provisions concerning investigatory interviews reflect the U.S. Supreme Court's holding in *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) . . . upholding the Board's determination that the National Labor Relations Act provides a statutory "right to union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him." 420 U.S. 251 at 267. [124 Cong. Rec. 29,184 (1978).]

Given that purpose, the *Weingarten* case's rationale and the underlying Board law are very much in point. In *Weingarten*, this Court had approved the National Labor Relations Board's "construction [of the National Labor Relations Act] that § 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." 420 U.S. at 256. The Court noted that "th[is] right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection, *id.*, and, in so doing, "insist on concerted protection, rather than individual self-protection, against

[5] NLRA § 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . [29 U.S.C. § 157.]

possible adverse employer action." *Id.* at 257 (quoting *Mobil Oil Corp.*, 196 NLRB 1052 (1972)).

The *Weingarten* Court explained that the NLRA "protect[s] 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection'" in order "'to redress the perceived imbalance of economic power between labor and management.'" 420 U.S. at 261-262, quoting 29 U.S.C. § 151 and *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). And, the Court noted, "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate. . . ." *Weingarten*, 420 U.S. at 262. Thus, the Board's construction of the NLRA "gives recognition to the right when it is most useful to both employee and employer." *Id.* at 262.

Elaborating on the utility of union representation in the investigatory setting, the Court explained:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. [420 U.S. at 262-263.]

Indeed, *Weingarten* involved an interview very much like the interview by the NASA-OIG inspector here. For *Weingarten* grew out of a situation in which a sales clerk employed in a store operated by a large retail chain was called in for an interview by a "Loss-Prevention Specialist[]" employed in the chain's "companywide security department" as part of an investigation of alleged thefts. 420 U.S. at 254. And, the NLRB, far from ignoring

this context, specifically relied on the proposition that when "an investigative interview is conducted by security specialists[,] the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques," and that this unfamiliar setting, along with the "sophisticated techniques" employed by such specialists, "increase not only the employees' feelings of apprehension, but also their need for experienced assistance in dealing with them." *Id.* at 265 n.10.

Given the rationale and particular circumstances of *Weingarten,* it is not surprising that the NLRB has consistently found that employees are entitled to request union representation when they are called into interviews by special employer security officers investigating alleged employee criminal activity. *See, e.g., Illinois Bell Telephone Company,* 221 NLRB 989, 991 (1975) (violation found where the investigation involved alleged theft of company property by the employee, and it was conducted by employer's security representative); *Detroit Edison Company,* 217 NLRB 622, 623 (1975) (violation found where the investigation involved alleged irregularities in travel reimbursement claims by the employer, and it was conducted by the employer's security department).

Against this background, the most sustained argument for "extending to Federal employees the same protection already available to employees in the private sector under the . . . Supreme Court [decision] in *Weingarten*" focuses on the federal sector equivalent of the private sector employer security officer examinations that precipitated the *Weingarten* rule. H. Rep. No. 95-920, 95th Cong., 2d Sess. 2 (1978).

While the FSLMRS was under consideration by the House Committee on Post Office and Civil Service, the Committee also issued a report on H.R. 3793, a bill to "provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct." H. Rep. No. 95-920, 95th

Cong., 2d Sess. 1 (1978).[6] To support its conclusion that there should *not* be "two sets of standards for employee rights, one for the private sector and another, more restrictive standard, for public employees," the Report quotes the following testimony describing investigations at the Internal Revenue Service and the need for assistance to employees subject to such interrogation:

> Typically, when an employee is summoned to appear before an IRS Inspection Service, for example, it is done without warning, and seldom is the employee advised of the nature of the interview. He or she is merely told to report to a certain room at a specified time. Upon arriving, and with no opportunity to collect his or her thoughts, the employee is immediately sworn in and must answer all questions. Failure to report for the interview, be sworn in, or answer any questions is the basis for disciplinary action.
>
> Normally, there are two inspectors present. One conducts the interrogation, firing questions at the employee, while the other takes notes. There is no formal record or transcript of the interview. Though IRS regulations require that inspectors reveal information within their possession concerning the incidents being investigated, this is seldom done.
>
> With no one to advise them of their rights, few employees have the experience or presence of mind to deal with professionally trained criminal investigators who are supposed to be experts in the art of interrogation. Nervous and unaccustomed to such surroundings, employees are oftentimes questioned about matters which occurred years before, may be subject to badgering or harassment, becoming so confused and flustered that they agree with answers sug-

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[6] Insofar as H.R. 3793 would have provided federal employees representation rights similar to those of private section employees, that bill was subsumed in the bill enacted as the FSLMRS.

> gested by the inspectors even though their responses do not truly reflect what transpired. [H. Rep. No. 95-920, p. 3.]

As H. Rep. No. 95-290 shows, Congress in "extend-[ing] *Weingarten* protection to federal employees," Pet. App. 10a, had very much in mind the federal sector equivalent of the type of examination conducted by the employer "security specialists" identified in *Weingarten* itself. 420 U.S. at 265 n.10.

That being so, the FLRA decision in this case—and the Authority's reading of "representative of the agency" on which the decision rests—is correct not only in its general terms but also in capturing Congress' intent with regard to the precise kind of examination by the precise kind of examiner at issue here.

Indeed, the post-FSLMRS-enactment development of the *Weingarten* doctrine itself by the NLRB provides the most striking confirmation of the correctness of the FLRA construction of § 7114(a)(2)(B) and of the Authority's grasp of the underlying congressional intent—*viz.*, to provide federal employees covered by the Federal Labor Statute full *Weingarten* rights.

The NLRB has consistently held that employees of the U.S. Postal Service—which is covered by the NLRA, rather than the FSLMRS, 39 U.S.C. § 1209(a)—have *Weingarten* rights during interviews conducted as part of "criminal investigations conducted by the Postal Inspection Service." *U.S. Postal Service*, 241 NLRB 141, 142 (1979). "Postal inspectors"—like OIG investigators—"are not under the supervision or direction of postal supervisors or managers." *U.S. Postal Service*, 288 NLRB 864, 865 (1988). Rather, the postal inspectors are under "the authority of the Chief Postal Inspector, whose office is in Washington and who reports to the Postmaster General." *Id.*

As the D.C. Circuit noted in sustaining the NLRB's application of *Weingarten* to Postal Inspection Service investigations,

> Postal Inspectors are USPS employees. They serve, however, as federal law enforcement officers, with authority to carry weapons, make arrests, and enforce postal and other laws of the United States. *See* 18 U.S.C. § 3601. The Inspection Service undertakes investigations only when criminal conduct is suspected. If an investigation reveals no crime, the Inspectors turn over the evidence they have gathered to USPS management, without recommendation or evaluation. Management then decides whether the evidence warrants disciplinary action. [*U.S. Postal Service v. NLRB*, 969 F.2d 1064, 1066 (D.C. Cir. 1992).]

Given the all but identical place of the Postal Inspectors in the Postal Service structure and of the NASA-OIG investigators in the NASA structure and given the all but identical employee examinations for all but identical establishment purposes each conducts, it follows *a fortiori* from the *Postal Service* cases, we submit, that the FLRA is correct in its recognition that a NASA employee who is subject to a NASA-OIG examination like the one here has the cognate *Weingarten* right it is the purpose of FSLMRS § 7114(a)(2)(B) to provide.

C. NASA's Reading of the Phrase "Representative of the Agency" Is Contrary to the Statutory Language and Would Defeat the Legislative Intent.

NASA's basic position is that "the phrase 'representative of the agency'" in FSLMRS § 7114(a)(2)(B) "describe[s] a representative of . . . the entity that has a collective bargaining relationship with a union," NASA Br. 8, and that "an OIG investigator is not such a representative and therefore is not required to comply with 5 U.S.C. § 7114(a)(2)(B) when conducting investigative interviews," *id.* at 16. NASA can thus be understood (i) to be contending that the "pertinent 'agency,'" *Department of Justice*, 137 F.3d at 688, is some entity *other* than NASA, which other entity the NASA-OIG does not represent; or (ii) to be contending that the NASA-OIG is not a NASA "representative." In either version, NASA's

argument is contrary to the statutory language and to the effectuation of the representation rights so evidentially granted to federal employees by that language.

1. We begin by taking NASA to be seeking—as have other federal agencies in resisting union representation at OIG interrogations—"an interpretation of the statute limiting 'agency' to the subdivision comprising the collective bargaining unit." *Defense Criminal Investigative Service*, 855 F.2d at 99. In this vein, NASA's brief distinguishes between a "parent agency" and the "component of the agency . . . that directly employs the person under investigation." NASA Br. 22 & 23. *See also* NASA Cert. Pet. 12 ("agency component that engages in collective bargaining"). And, based on this distinction, NASA asserts that the "agency" referred to in § 7114(a)(2) is "the management entity that has a collective bargaining relationship with a union," NASA Br. 8, rather than the "parent agency," *id.* at 22. *See also id.* at 23 ("The OIG does not in fact contain the bargaining unit to which the employee under investigation belongs. . . .").

In its brief to this Court, NASA maintains a studied vagueness about what it means by the "component of the agency," NASA Br. 23, that is "the management entity that has a collective bargaining relationship with a union," *id.* at 18.[7] But, whatever NASA's precise meaning may be, the proposition that a "management entity" that is a "component of the agency" can itself be an "agency" within the meaning of the FSLMRS will not wash.

Simply stated, the FSLMRS does *not* provide for any "collective bargaining relationship between a union and *management*," much less between a union and a "management entity." NASA Br. 17 & 18 (emphasis added). The statute provides for collective bargaining—and other forms of representation and consultation—between an

[7] A clue to NASA's meaning is supplied by its answer in this case, which identifies the Marshall Space Flight Center as a "component installation of NASA under 14 C.F.R. § 1201.200(c)(7)." Answer ¶ 5.

"*agency* and an[] exclusive representative in an[] appropriate unit." 5 U.S.C. § 7114(a)(4) (emphasis added). *See* 5 U.S.C. § 7114(c)(1) (any agreement reached in negotiations is "subject to approval by the head of the agency"). And, as we have demonstrated at pp. 9-10, and as we reiterate in the margin, the statutory definitions exclude the possibility that a "management entity," NASA Br. 18, that is a "component of the agency," *id.* at 23, can itself be considered an "agency" within the meaning of the FSLMRS.[8] Indeed, at one point NASA recognized as much—its answer "denie[d] that the George C. Marshall Space Flight Center (MSFC) is an agency under 5 U.S.C. § 7103(a)(3)," precisely on the grounds that "MSFC is a component installation of NASA." NASA Answer § 5.

2. Alternatively, NASA can be understood to take the position that, even though NASA is the pertinent "agency," the NASA-OIG investigator cannot be NASA's "representative" for purposes of FSLMRS § 7114(a)(2)(B). In its first variant, NASA's point is that the term "representative" of an agency, as used in the FSLMRS, refers exclusively to the agency's collective bargaining representative, and that the NASA-OIG investigator, not being a collective bargaining representative, cannot be a "repre-

[8] By the Federal Labor Statute's definition, *only* an "Executive agency" qualifies as an "agency." 5 U.S.C. § 7103(a)(3). As we have seen, NASA is an "Executive agency" by virtue of the fact that the Administration is an "independent establishment" in the executive branch. 5 U.S.C. §§ 104 & 105. *See* pp. 9-10, *supra*. And, as we have stressed, the definition of "independent establishment," *expressly excludes* "an establishment in the executive branch" that is a "*part of* an independent establishment." 5 U.S.C. § 104(1) (emphasis added). Thus, if NASA is an "independent establishment"—and NASA unquestionably is—then NASA's Marshall Space Flight Center is a "part of an independent establishment" and, by virtue of that fact, *cannot* be an "independent establishment" itself. 5 U.S.C. § 104(1). If the Center is not "an independent establishment," the Center—as an "entity" distinct from NASA—cannot be an "Executive agency," 5 U.S.C. § 105, and, thus, cannot be an "agency," as defined in the FSLMRS § 7103(a)(3).

sentative" in any other sense. In its second variant, NASA's point is that a "representative" is a person in the line of management control of the party the "representative" represents and that to the extent a NASA-OIG investigator is independent of NASA's managers, he cannot be a "representative of th[at] agency." We take these variations on a theme in turn.

a. In the first regard, NASA begins from the proposition that "[a]ll of the rights and duties in Section 7114 arise out of the collective bargaining relationship between a union and management," NASA Br. 17, and claims that " 'representative of the agency' in Section 7114(a)(2)(B) must also refer to a representative of management in the collective bargaining relationship," *id.* at 19, in the sense of the person or division of the agency that "represents management" at "the bargaining table," *id.* at 22.

(i) NASA's premise is wrong, and its conclusion is therefore wrong as well. Section 7114 refers to representation in *at least three different settings*—"negotiat[ion of] collective bargaining agreements," § 7114(a)(1), "formal discussion[s] . . . concerning any grievance or any personnel policy or practices or other general condition of employment," § 7114(a)(2)(A), and the "examination of an employee in the unit by a representative of the agency," § 7114(a)(2)(B)—and *not* in the single setting of collective bargaining negotiations. And, there is nothing in the FSLMRS that suggests, much less compels, the conclusion that the statute contemplates an "agency" will be and must be represented by the same person or division in each of these different settings. Nor is there anything in reason, in the general statutes governing the organization and management of independent executive branch establishments or in normal organizational practice that dictates such an arrangement.

As the Third Circuit noted, "an Executive agency, like many large corporations, might choose an organizational structure including a personnel relations department whose

specialized employees are charged with the responsibility of negotiating collective bargaining agreements on behalf of all subdivisions of the agency." *Defense Criminal Investigative Service*, 855 F.2d at 99.

(ii) In a nod toward the statutory definitions, NASA finds it significant that the statute defines "collective bargaining" as "the mutual obligation of *the representative of an agency* and the exclusive representative of employees in an appropriate unit . . . to consult and bargain in a good faith effort to reach agreement." NASA Br. 18, quoting with emphasis 5 U.S.C. § 7103(a)(12). According to NASA, because the emphasized phrase "representative of an agency" in § 7103(a)(12) is similar to the phrase "representative of the agency" in § 7114(a)(2)(B), the most appropriate inference is that Congress intended, in both instances, that the "representative" of the agency must be the same person or subpart of the agency. *See id.* at 18 & n.8.[9] With all due respect, that is a completely improbable inference.

The use of the term "representative" throughout the FSLMRS is most fairly interpreted as showing Congress's recognition that agencies and labor organizations, as legal entities, can only participate in "negotiations," 5 U.S.C. § 7114(b)(2), "formal discussion[s]," *id.* § 7114(a)(2)(A), or "examination[s] of an employee," *id.* § 7114(a)(2)(B), through persons who act for and on their behalf—*viz.*, through "representative[s]." The fact that the statute uses the term "representative"—in its ordinary sense as referring to someone who represents another—in these various contexts does not provide any basis for the

[9] In a similar vein, NASA finds it significant that OIG employees are excluded from any appropriate bargaining unit by FSLMRS § 7112 (b). NASA Br. 23 & 32 citing 5 U.S.C. § 7112(b)(7). But § 7112(b) also excludes "any management official or superior" from any appropriate bargaining unit. 5 U.S.C. § 7112(b)(1). And, we do not understand NASA to argue that no "management official or supervisor" can be a "representative of the agency" within § 7114(a)(2)(B).

proposition that each party is put into a straight jacket by being allotted one representative who must remain the same in all contexts no matter how different those contexts may be.

It is particuarly to the point that there is nothing in the language, purpose or explanation of FSLMRS § 7114(a)(2)(B) to suggest that an employee has the right to union representation only when the "representative[s] of the agency" at examination happen to be the agency's collective bargaining representative as well. Indeed, there is nothing in the statute to suggest that collective bargaining should even take place during the examination, and the well-settled restrictions on the role of the union representative in the examination strongly suggest the contrary.[10]

Nor is there any reason to believe that Congress thought the need for union representation was greater when the examiner is the agency's collective bargainer than when the examiner is its trained investigator. To the contrary, as we have seen, all indications are that Congress was concerned especially about the employee's need for assistance when the examiner is a security specialist.

And, it is surely not coincidental that NASA's reading of § 7114(a)(2)(B) would permit an agency to eliminate entirely the *Weingarten* rights of employees in a bargaining unit constituted on less than an agency-wide basis by simply assigning the agency's collective bargaining to

[10] It is equally clear that the "formal discussion[s] between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment" referred to in § 7114(a)(2)(A) do *not* constitute collective bargaining. *See* NASA Br. 19. The employees are represented in collective bargaining *only* by their "exclusive representative." 5 U.S.C. § 7114(a)(4). That is what the "exclusive" in "exclusive representative" means. The opportunity for employees to address employment-related matters through a "representative, other than the exclusive representative, of the employee's own choosing" is restricted to a "grievance or appeal action." *Id.* § 7114(a)(5)(A).

local management while keeping the authority to investigate employee misconduct in a centralized security office.[11]

(iii) NASA's attempt to demonstrate that the "representative" referred to in § 7114(a)(2)(B) must be a coltive bargaining representative because this Court's *Weingarten* decision treats the right to union representation at investigatory interviews as a species of the right to engage in collective bargaining, NASA Br. 19-21, is every bit as wrong as its statutory language argument.

Weingarten rights under both the NLRA and the FSLMRS are *not* a species of collective bargaining rights in the narrow sense that NASA would understand that term. This Court's opinion in *Weingarten* repeatedly emphasizes that "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." 420 U.S. at 259. *See also id.* at 260 ("The employer has no duty to bargain with the union representative" and may "insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."). And, the violation found by the NLRB in *Weingarten*—as is true of the violation found by the FLRA here—was *not* the unfair labor practice of "refus[ing] to bargain collectively with the representatives of [the] employees," 29 U.S.C. § 158(a)(5), 420 U.S. at 264, but the § 8(a)(1) violation of "interfer[ing] with, restrain[ing], and coerc[ing] the individual right of the employee, protected by § 7 of the Act, 'to engage in . . . concerted activit[y] for . . . mutual aid or protection,'" *id.* at 252. *Compare* Pet. App. 49a ("find[ing] . . . that NASA . . . committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute") *with* 5 U.S.C. § 7116(a)(5) ("it shall be an unfair labor practice for an agency . . .

[11] The FSLMRS provides for "appropriate unit[s] . . . established on an agency, plant, installation, functional, or other basis." 5 U.S.C. § 7112(a).

to refuse to consult or negotiate in good faith with a labor organization as required by this chapter").[12]

In addition, the *Weingarten* Court's recognition that "seeking the assistance of his statutory representative" at an investigatory interview is the exercise of an "*individual* right," 420 U.S. at 257 (emphasis added), demonstrates that *Weingarten* right is different in nature from the right to engage in *collective* bargaining. *See also id.* at 256 ("serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative"). Given the "individual" nature of this right, for example, the employee may individually waive representation by agreeing "to enter the interview unaccompanied by his representative." *Id.* at 258-259. *See also id.* at 257 ("In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative."). The right to collectively bargain, as a statutory collective right, by contrast, may not be waived by individual employees without the agreement of the bargaining unit's exclusive representative. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) ("Bargaining carried on by the employer directly with the employees . . . would be subversive of the mode of collective bargaining which the statute has ordained . . . .").

b. NASA argues too that NASA-OIG cannot be viewed as NASA's representative, because the agency "could not direct the investigator, and * * * ha[s] no control over him." NASA Br. 23. This variant of NASA's position is flawed in both its major and minor premises.

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12 At one time, the NLRB did find a "collective bargaining" right to union representation during certain interviews. *Texaco, Inc., Houston Producing Div.*, 168 NLRB 361, 362 (1967), *enf. den'd*, 408 F.2d 142 (5th Cir. 1969). But the Board distinguished that right from the right to representation sustained in *Weingarten*. *Quality Manufacturing Co.*, 195 NLRB 197, 198 (1972), *aff'd, sub nom. Garment Workers v. Quality Manufacturing Co.*, 420 U.S. 276 (1975).

To begin with the argument's minor premise, it is simply not true that NASA has "no control" over a NASA-OIG investigator. As a general matter, the NASA-OIG is a "unit[]" within NASA, 5 U.S.C. app. 3 § 2, "under the general supervision of the head of [NASA]," *id.* § 3(a). And, as part of his or her "general supervision" of NASA-OIG, the head of NASA surely has authority to direct OIG investigators to conduct their investigations in conformity with federal law.

Indeed, as we have stressed an employer can meet its obligations under § 7114(a)(2)(B) by simply "offer[ing] the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all." *U.S. Department of Justice, Bureau of Prisons*, 27 FLRA at 879. And, it was only the prospect of employment discipline by NASA if an employee does not respond to the call of a NASA-OIG investigator to an interview that denied the employee here the "choice . . . [of] having no interview at all." Thus, had NASA itself taken steps to assure the employee that he was free to decline to participate in the examination without any prospect that NASA would discipline the employee for so declining, then there would have been no violation at all.

The major premise of NASA's argument—that the *sine qua non* of a "representative" is being under the direction and control of the represented party's general managers—is made of whole cloth. So far as NASA shows, and so far as we are aware, there is no iron law of establishments that decrees that all employees acting for and on behalf of an establishment must be under the control of the establishment's general management. Indeed, as the *Weingarten* cases cited at pp. 19-23, *supra*, demonstrate, it is not unusual for private sector establishments, like retail store chains, and public sector establishments, like the Postal Service, to provide for an internal security division with certain investigative responsibilities that *operates within its scope of general authority and outside of the line of control of the establishment's general management.*

Under the general definition of "representative," at least so long as those investigators are carrying out an authorized investigation on behalf of the establishment, the investigators are every bit as much the establishment's representatives as if the investigators were under the control of general management. In both situations, the investigator is acting within the scope of his authority for and on behalf of the establishment.

* * *

In sum, the FLRA's construction of the statutory phrase "representative of the agency" in FSLMRS § 7114(a)(2)(B) is not only consistent with the plain meaning of the statutory language but well-suited to fulfilling the Congressional purpose in enacting that provision. The alternative interpretation of that statute advanced by NASA, in an attempt to impeach the FLRA's construction of the FSLMRS, serves only to underscore the reasonableness of the Authority's interpretation. The Authority's interpretation is, therefore, surely a "permissible construction of the statute," *Fort Stewart Schools*, 495 U.S. at 645, and was properly sustained as such by the court below, Pet. App. 9a.

II. FSLMRS § 7114(a)(2)(B), AS CONSTRUED BY THE FLRA, DOES NOT CONFLICT WITH THE INSPECTOR GENERAL ACT.

Given that the FLRA's construction of the statute the Authority is charged with enforcing is sound, the remaining question is, as the court below put it, whether there is such "a discernible present conflict between the I[nspector] G[eneral] Act and [FSLMRS] § 7114(a)(2)(B)" as to require "read[ing] the IG Act to have impliedly repealed this section of the FSLMRS." Pet. App. 15a. And, as the court below concluded, in agreement with the Third Circuit, FSLMRS § 7114(a)(2)(B) and the Inspector General Act are not "so clearly irreconcilable" as "to imply an exception [to the former] based solely on the enactment of the IG Act." *Defense Criminal Investigative Service*, 855 F.2d at 100. Pet. App. 14a-15a.[13]

NASA posits two points of conflict between the FSLMRS and the IGA. First, NASA argues that allowing a union representative to be present at an employee examination will interfere with "the OIG's duty to maintain confidentiality." NASA Br. 33. Second, NASA argues the FLRA's construction of FSLMRS § 7114(a)(2)(B) "imposes major restrictions on the OIG's freedom to investigate." *Id.* at 34. We take up each point in turn.

A. NASA maintains that the "[a]ttendance of a union representative at an OIG interview can interfere with the reporting and nondisclosure obligations imposed by the Inspector General Act." NASA Br. 33. The statutory provision, which, according to NASA, imposes these "ob-

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[13] We note parenthetically that the greater part of NASA's argument from the Inspector General Act does *not* concern any alleged conflict between the IGA and the FSLMRS but rather the assertion that the independence granted to the Office of the Inspector General under the IGA precludes treating an OIG investigator as a "representative of the agency" within the meaning of FSLMRS § 7114(a)(2)(B). We have addressed that argument in point I, *supra*, and demonstrated that the FLRA was acting well within its discretion in rejecting NASA's argument as to the proper construction of FSLMRS § 7114(a)(2)(B).

NASA incorrectly suggests, in this regard, that the FLRA's application of FSLMRS to OIG investigations is "not entitled to deference" on the grounds that the "FLRA's ruling in this case depends on a construction not of the FSLMRS, but also of the Inspector General Act." NASA Br. 39. Aside from the two asserted conflicts between the FSLMRS and the IGA, which we discuss in text in this part of our brief, neither the FLRA, nor the union party to this case, has joined issue with NASA over the meaning of the various provisions of the IGA discussed at pages 25-33 of NASA's brief. Thus, the FLRA's consideration of that argument does not depend on any "construction . . . of the Inspector General Act," NASA Br. 39, but only on a construction of FSLMRS against the backdrop provided by the plain—and uncontested—meaning of the IGA.

ligations" on an OIG is IGA § 4(d) which in its entirety, states:

> In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law. [5 U.S.C. app. 3 § 4(d).]

There is nothing in this provision that even suggests an OIG "nondisclosure obligation[]," NASA Br. 33, or a "duty of confidentiality." *Id.* at 34.

That is sufficient in itself to defeat NASA's conflict claim. And, even giving NASA its premise, its argument proves attenuated in the extreme.

NASA argues that the union representative might breach confidentiality "by sharing information learned during the investigatory interview with other members of the collective bargaining unit, who might subsequently be interviewed or requested to produce documents." NASA Br. 34. But assuming there was an OIG investigator's "duty of confidentiality" with respect to the subject matter of an OIG investigation, *id.*, the interview itself is most assuredly *not* confidential.

In the first place, there is nothing to stop the interviewed employee from sharing with other employees or with the union what went on in the interview. Moreover, as NASA admits, the employee has a right to be accompanied in the examination by a personal attorney under 5 U.S.C. § 555(b), and while NASA speculates that "[a]n employee's attorney *may* have incentives not to share information with other employees," NASA Br. 34 (emphasis added), there is certainly nothing in the law that precludes the attorney from so doing.[14]

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[14] The "incentives" against sharing information that NASA believes an attorney "may have" are "preserv[ing] the attorney-client privilege and avoid[ing] the appearance of witness tampering or obstructing a federal inquiry." NASA Br. 34. But statements made by the employee to an OIG investigator are not privileged. And, the union representative "may have" the same "incentives" to avoid the "appearance of witness tampering or obstructing a federal inquiry." *Id.*

In any event, the NASA-OIG raised no concern about "confidentiality" when he allowed both a union representative and the employee's attorney to be present at the examination in question. If serious concerns about confidentiality arise in future OIG examinations, those concerns can be addressed at the time. The FLRA recognizes that "agency management may have need, under certain circumstances, to place reasonable restrictions on the exclusive representative's participation at a section 7114(a)(2)(B)." Pet. App. 46a. In appropriate circumstances, it may be appropriate for an agency to insist on a confidentiality agreement from the union. *See Oil, Chemical & Atomic Workers v. NLRB*, 711 F.2d 348, 362 (D.C. Cir. 1983).

B. NASA also argues that FSLMRS § 7114(a)(2)(B) "imposes major restrictions on the OIG's freedom to investigate," because that "provision as construed by the FLRA involves far more than the mere presence of a union representative at an interview." NASA Br. 34. NASA acknowledges, in this regard, that it can "'point[] to no specific examples in which the assertion of *Weingarten* rights has interfered with OIG investigations.'" NASA Br. 35, quoting Pet. App. 14a. But, NASA maintains, nevertheless, that there has been "insufficient weight [given] to the concerns expressed by OIGs over the broad expansion of statutory *Weingarten* rights in the FLRA's decisions." NASA Br. 35-36.

Whether the FLRA is guilty of some overly "broad expansion of statutory *Weingarten* rights with regard to the role of a union representative at an OIG examination," NASA Br. 35-36, is, of course, *not* a question before the Court in this case. That was an issue before the FLRA,

because NASA initially defended itself on the grounds that "it had acted reasonably" in limiting the intervention of the union representative and that it had "not interfered with [the representative's] rights to participate." NASA Br. 9. In the court below and in this Court, however, NASA has taken the more aggressive position that there is *no* right to union representation at all. Thus, the only FLRA ruling here is the narrowest possible ruling—*viz.* that federal employees have a *Weingarten* right in an OIG examination of the kind at issue here.

In any event, when NASA makes concrete its "concerns," those prove entirely insubstantial. NASA points to precisely two FLRA rules that ostensibly allow a union representative to "direct and limit how the Inspector General conducts an investigation." NASA Br. 35. The FLRA rules in question are: that the union representative has a right to "be informed in advance of the general subject of an examination so that the employee and union representative may consult before questioning begins;" and that the employee has "the right to halt the examination and to step outside the hearing of investigators to discuss with the union representative answers to the investigator's questions." *Id.* at 35. But see *Bureau of Prisons*, 52 FLRA 421, 432-435 (1996) (holding that there is no per se right to halt an examination.)

Neither of these consultation rights even remotely allows the union representative to "direct and limit how the Inspector General conducts an investigation." *Id.* at 34. And, it is difficult to believe that the employee's attorney —whose presence as of right is uncontested by NASA— would not have similar rights to consult with his or her client. 5 U.S.C. § 555(b).

It bears emphasis, in this regard, that the IGA gives OIG investigators *no* authority to compel employee attendance at interviews. The *only* means an OIG investigator has of compelling a federal employee to participate in an interview is by drawing upon the authority of the

agency to discipline the agency's employee for refusal to participate. IGA "authorize[s]" OIGs to "request such . . . assistance" from a federal agency. 5 U.S.C. app. 3 § 6(a)(3). But the IGA does only requires the agency to comply with the request "insofar as is practicable and not in contravention of any existing statutory restriction or regulation." *Id.* § 6(b)(1).

Thus, the IGA is not violated when a federal agency meets its duty under FSLMRS § 7114(a)(2)(B) by insuring that its employees are given the choice of declining to participate in an interview the employee reasonably believes may result in discipline where the OIG investigator refuses the employee's request for union representation. The agency can accomplish this, by merely making clear to its employees that it will not discipline them for declining to participate in such an interview.

CONCLUSION

For the above stated reasons the decision below should be affirmed.

Respectfully submitted,

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